(1)

88-59

No. _____

In The

Supreme Court of the United States

October Term, 1988

UNITED STEEL & WIRE COMPANY,

Petitioner,

v.

CARL STALLWORTH, COYLE SWIFT, VINCENT GARRETT, R. D. WARREN, WALTER STOKES, HELEN ANDERSON, DAVID CHASE, LARRY CLINTON, MILTON FIELDS, RHONDA HOWLETT, CARL JOHNSON, DAWN KING, CARL MAYBERRY, HOWARD MORGAN, THOMAS ROBINSON, WILLIE SLAUGHTER, CLARENCE TRAVIS, BRIAN TREAT, KATHY WHITNEY and RODGER WILLIAMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A STATE COURT CONTRACT ACTION AGAINST AN EMPLOYER CHALLENGING AN EMPLOYEE'S DISCHARGE IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT ("THE ACT") AND THIS COURT'S HOLDING IN *SAN DIEGO BUILDING TRADE COUNCIL* v *GARMON*, WHERE THE STATE TRIAL COURT FOUND THAT THE DISCHARGE CONSTITUTED AN UNFAIR LABOR PRACTICE UNDER THE ACT?

II.

WHETHER THE EXCEPTION TO THE ACT'S PREEMPTION UNDER *GARMON* FOR ACTIONS ROOTED IN LOCAL CONCERNS IS APPLICABLE WHERE:

1. THE PLAINTIFFS' CLAIMS ARE FOR VIOLATION OF AN ALLEGED ORAL EMPLOYMENT CONTRACT UNDER GENERAL STATE CONTRACT LAW;
2. THE REMEDY SOUGHT IS ESSENTIALLY THE SAME AS THAT AVAILABLE THROUGH THE ACT;
3. THE INDIVIDUAL INTEREST SOUGHT TO BE PROTECTED UNDER STATE LAW — PRESERVATION OF EMPLOYMENT — IS THE SAME AS THAT PROTECTED BY THE ACT; AND
4. THE RECORD BELOW IS DEVOID OF ANY PROOFS OR SUPPORT FOR ANY FINDING THAT A STATE CONTRACT CLAIM FOR BREACH OF AN EMPLOYMENT CONTRACT IS SO "ROOTED IN LOCAL FEELING" AS TO BE AN EXCEPTION TO *GARMON*.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner United Steel & Wire Company ("US&W") requests that a Writ of Certiorari issue to review the order of the Michigan Supreme Court denying petitioner leave to appeal from a decision of the Michigan Court of Appeals in this matter, which order is dated March 29, 1988.

ORDERS AND OPINIONS BELOW

The Michigan Supreme Court's order denying leave to appeal is not published, and is contained in the Appendix at p. A-1.

The opinion of the Michigan Court of Appeals dated August 6, 1987, affirming the trial court's denial of petitioner's motion to dismiss respondents' claim

because preempted under federal labor law has not been published, and is also contained in the Appendix at p. B-1.

The opinion of the Circuit Court for Calhoun County, Michigan, denying petitioner's motion to dismiss is also unpublished, and is contained in the Appendix at p. C-1.

JURISDICTION

This case is a state common law contract action for reinstatement and back pay by a number of former employees of petitioner. The plaintiffs below allege that they had oral contracts of employment which petitioner violated when it discharged them in 1982.

Petitioner filed a motion to dismiss in the trial court on the grounds that respondents' state law contract claims were preempted under the National Labor Relations Act ("the Act") as interpreted by this Court in *San Diego Building Trades Council* v *Garmon*, 359 US 236, 79 S Ct 773, 3 L Ed 2d 775 (1959). Even though the trial court found that the separation of respondents by petitioner would be, if the allegations were true, unfair labor practices under the Act, the two highest courts of Michigan held that they could nevertheless proceed to exercise jurisdiction over those discharge claims.

The preemption rule under *Garmon*, and the balance between state interests and the intent of Congress in enacting the Act set forth in *Garmon*, are critically important principles of federal labor law. Petitioner seeks review in this Court because the rulings of the Michigan courts are directly contrary to *Garmon*. If state courts are allowed to apply general contract law to remedy employee discharges where the discharges are

unfair labor practices, *Garmon* will be effectively overruled. The balance between federal and state authority under the Act will be fundamentally altered. This Court's cases, discussed below, do not allow such a result.

It is because *Garmon* has been seriously misapplied by the Michigan courts, and because a critical preemption issue has been improperly resolved by those courts, that petitioner seeks review pursuant to Supreme Court Rule 17.1(c).

STATUTE INVOLVED

Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2) of the National Labor Relations Act, 29 USCA §§ 158(a)(1), 158(a)(2), 158(a)(3), 158(b)(1) and 158(b)(2):

> § 158. *Unfair Labor Practices*
>
> (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

STATEMENT OF THE CASE

A. The State Court Proceedings

This is an action brought in the Circuit Court for Calhoun County, Michigan by twenty former employees of petitioner United Steel & Wire ("US&W") of Battle Creek, Michigan.

Respondents' complaint alleged that each had an oral employment contract under Michigan law which US&W breached by dismissing them from employment in 1982. In its answer, US&W denied the existence of any such oral contract, and timely asserted that in any event state law contract claims were preempted by the National Labor Relations Act ("the Act"), 29 USCA § 157 *et seq.*

Thereafter, US&W filed a motion in the trial court challenging the state court's subject matter jurisdiction. That motion was based on the preemption doctrine fashioned by this Court in *San Diego Building Trades Council* v *Garmon*, 359 US 236, 79 S Ct 773, 3 L Ed 2d 775 (1959). After briefs and oral argument, the trial court issued Findings denying US&W's motion. An order to this effect was entered on November 27, 1986. [App. C]

Because the trial court's ruling was contrary to federal preemption law as applied by this Court, a timely appeal was filed with the Michigan Court of Appeals. That court affirmed the decision of the trial court in an opinion dated August 6, 1987. [App. B] The company's timely Application for Leave to Appeal to the Michigan Supreme Court was denied by order entered March 29, 1988. [App. A]

Because the state court's assertion of jurisdiction over respondents' claims is in clear disregard of *Garmon*, petitioner now seeks review in this Court.

B. The Petitioner's Business And Employment Of Respondents[1]

Petitioner was incorporated on May 17, 1982. It did not acquire a business or begin functioning until July 23, 1982, when it purchased the assets of two Battle Creek companies which had gone out of business and ceased operations. These companies were the Food Handling Division of Roblin Industries, Inc. ("Roblin") and Michner Plating Company ("Michner").

For many years prior to July, 1982, Roblin had operated its Food Handling Division, which included plants in Battle Creek. This Roblin division was involved primarily in the manufacture of shopping carts and other food handling equipment. In one of Roblin's three Battle Creek plants, Michner operated a plating business in space rented by Michner from Roblin. Michner was a "captive plater," doing plating work almost exclusively for Roblin in this rented space.

At the time it ceased operations, Roblin had two collective bargaining agreements with the United Auto Workers Union ("UAW") covering the jobs of many of its Battle Creek hourly employees. One was with UAW Local 704 (production and maintenance employees), and the other was with UAW Local 1215 (covering Battle Creek office clerical employees). Michner had a collective bargaining agreement with Local No. 34, International Brotherhood of Teamsters, Warehousemen and Helpers of America ("Teamsters"), covering Michner's Battle Creek hourly production and maintenance employees.

On July 2, 1982, Roblin and Michner both ceased their Battle Creek operations in all plants and went out of business. At that time, Roblin and Michner termi-

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[1] The following facts are undisputed below.

nated all their Battle Creek employees, including those covered by the collective bargaining agreements. Petitioner became aware of Roblin's decision to cease its Battle Creek operations. The new company believed it could profitably manufacture and market, under its own name and design, products similar to those made by Roblin. Accordingly, on July 23, 1982, US&W purchased the assets of Roblin's Food Handling Division and the assets of Michner's plating operation. Part of the assets included Roblin's former Battle Creek plants.

Because US&W was an entirely new enterprise, it was not subject to the collective bargaining agreements between Roblin and the UAW or between Michner Plating and the Teamsters. Petitioner established terms and conditions of employment for its new enterprise, which were substantially different from Roblin's, and began advertising for employees.[2]

On July 26, 1982, US&W started hiring its employees. Offers of employment were extended to many of the former Roblin and Michner employees. However, very few of the former unionized Roblin and Michner employees accepted these offers of employment, primarily because US&W's terms and conditions of employment were different than those under the failed employers' old collective bargaining agreements.[3]

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[2] Under the Act, a purchaser of assets like US&W, where such assets were formerly owned by a unionized employer such as Roblin or Michner, is not obligated to hire only from the former unionized employer's seniority list or to be bound by the collective bargaining agreement of the old unionized employer. A new employer such as US&W is free to make its own decisions as to terms and conditions of employment, and, in a non-discriminatory manner, to hire whomever it wishes. *NLRB* v *Burns Int'l Security Services*, 406 US 272, 92 S Ct 1571, 32 L Ed 2d 61 (1972); *Howard Johnson Co.* v *Detroit Joint Board*, 417 US 249, 94 S Ct 2236, 41 L Ed 2d 46 (1974).

[3] The right of a new employer to create its own terms and conditions of employment, rather than being forced to accept a

(*concluded on page 8*)

After US&W hired its employees and began its operations, very few former Roblin or Michner employees had accepted offers of employment. Because former Roblin and Michner union employees largely refused US&W's job offers, US&W had no obligation, after it began operations, to recognize or bargain with any union.[4] In fact, because petitioner's employees *had not chosen* to be represented by any union, US&W was prohibited by the unfair labor practice provisions of the Act, 29 USCA §§ 158(a)(1) and (3), from recognizing and bargaining with any labor organization.

C. The Unions' Efforts To Impose The Old Labor Contracts On Petitioner

On August 2, 1982, shortly after US&W began its operations, the UAW and the Teamsters began an aggressive campaign to force petitioner to apply the old

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(*continued from page 7*)

former employer's collective bargaining agreement, was specifically approved by this Court in *Burns*, note 2, 406 US at 287-288:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

[4] Under the NLRA, a purchaser of assets like US&W, where such assets were formerly owned by a unionized employer such as Roblin or Michner, is not required to assume the predecessor's obligation to recognize the union representing the predecessor's employees unless enough of the predecessor's unionized employees have accepted employment with the new employer so that they comprise a majority of the purchaser's workforce in the bargaining unit. *Burns, supra*, note 2; *Howard Johnson, supra*, note 2; *United Maintenance & Mfg. Co.*, 214 NLRB 529, 87 LRRM 1469 (1974).

Roblin and Michner labor contracts to the new company. The unions began mass picketing of US&W's three Battle Creek plants. The picketing was for the sole purpose of pressuring US&W to assume the old Roblin and Michner collective bargaining agreements, and to force US&W to replace its own employees with former Roblin and Michner union workers. The picketing included several instances of severe violence. Petitioner sought and was granted state court injunctive relief against that activity.

As part of its campaign against the new company, the UAW filed a lawsuit against Roblin and petitioner in the United States District Court for the Western District of Michigan. That suit claimed that petitioner should be required by the Court to hire only UAW members who were formerly employed by Roblin, and to apply Roblin's old collective bargaining agreements to those employees. The UAW alleged that this obligation arose on the theory that US&W was the "alter ego" of Roblin. *UAW* v *Roblin Industries, Inc and United Wire Co.*, W.D. Mich case No. K82-205-CA(9). This lawsuit was dismissed by the UAW before any ruling by the District Court.

Finally, the union's campaign included political influence in the City of Battle Creek. This was primarily for the purpose of preventing US&W from receiving Economic Development Corporation financing that had earlier been promised to petitioner. That assistance, as the union well knew, was absolutely necessary for US&W to finance its new operations.

D. The Discharges Of Respondents

The union's mass picketing and political pressures proved to be successful. Despite the best efforts of the City of Battle Creek Police Department, the

violence continued throughout August and September, 1982. This continuing violence was of great concern to US&W and also to Battle Creek officials, who were burdened with the cost of extra police overtime and the impact of an unfavorable public image.

The city established a "Blue Ribbon Committee" to attempt to end the violence. As a condition to ending the picketing, and also as a condition of reversing its objections to Economic Development Corporation financing for petitioner, the UAW demanded that US&W's employees be replaced by UAW members who had formerly worked for Roblin and by Teamster members who had formerly worked for Michner.

Because the continued violence made it difficult for US&W to operate, and because the EDC funding was absolutely necessary for economic survival, petitioner had two choices: agree to the UAW's conditions or fail as a business. To avoid collapse, US&W negotiated a collective bargaining agreement with the UAW, even though the union did not represent its employees. As part of this collective bargaining agreement, petitioner was required to hire the former Roblin and Michner union members and to give them preference for jobs over US&W's own employees. Petitioner honored its agreement with the UAW, hired the former Roblin and Michner employees and put them to work. Petitioner's own workforce, including the respondents, were as a result displaced.

Respondents therefore lost their jobs with petitioner because the company had to agree to a labor contract with the UAW at a time when the UAW did not represent US&W's employees. Despite the protections afforded them and their jobs by the Act, no unfair labor practice charges were ever filed with the National Labor Relations Board ("NLRB") by the respondents.

Instead, they filed the present action in state court. The complaint was filed four months *after* the six-month limitations period for unfair labor practice charges under the Act had expired.

REASONS FOR GRANTING THE WRIT

THE MICHIGAN COURTS' APPLICATION OF FEDERAL PREEMPTION PRINCIPLES UNDER THE ACT IS CONTRARY TO THIS COURT'S *GARMON* HOLDING AND, IF ALLOWED TO STAND, WILL UNDERMINE THE AUTHORITY OF THE NLRB IN AN AREA CLEARLY INTENDED BY CONGRESS AND THIS COURT TO BE WITHIN THAT AGENCY'S EXCLUSIVE JURISDICTION.

A. Background: Federal Preemption Under The Act

In early years following enactment of the Act, this Court struggled with the concept of what effect the legislation had on the ability of the states to enforce their own laws. This difficulty was due to the lack of Congressional guidance on what state actions and regulations were preempted by federal labor laws. Over the years, the Court has refined its position on preemption under the Act so that now there are two well-established preemption doctrines.

The first doctrine was set out in *San Diego Building Trades Council* v *Garmon*, 359 US 236, 79 S Ct 773, 3 L Ed 2d 775 (1959). In *Garmon*, the power of the State of California to award damages to an employer against a union for recognitional picketing of the employer, which the California courts found to be a tort under state law, was brought into question. The Supreme Court held that *if the activity the state attempts to regulate is either protected or prohibited by the Act, or arguably so protected or prohibited, the state's regulation is preempted.* As stated in *Garmon*, 79 S Ct at 780:

> When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts *must defer to the exclusive competence of the National Labor Relations Board* if the danger of state interference with national policy is to be averted.
>
> (emphasis added)

The reason for *Garmon*'s broad "arguably protected/arguably prohibited" standard of preemption is Congress' intent to vest the National Labor Relations Board ("NLRB") with exclusive jurisdiction of potential unfair labor practice issues. Neither the states nor the federal judicial system may interfere with that jurisdiction.

The second preemption doctrine was set out in the case of *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132, 96 S Ct 2548, 49 L Ed 2d 396 (1976). In *Machinists*, this Court addressed the application of a Wisconsin law which made it an unfair labor practice for a union to engage in a concerted refusal to work overtime. The Court held that state regulation and state law causes of action that concern conduct which Congress intended *to be left unregulated* are also preempted by the Act.

The *Garmon* and *Machinists* doctrines of preemption work together to protect the Congressionally-created federal labor relations scheme from potentially conflicting state statutory and common law. Since *Machinists* was decided in 1976, the Supreme Court has consistently decided preemption issues under the Act by applying *Garmon* or *Machinists*. See *Farmer* v *Carpenters*, 430 US 290, 97 S Ct 1056, 51 L Ed 2d 338 (1977); *Sears, Roebuck & Co.* v *Carpenters*, 436 US 180, 98 S Ct 1745, 56 L Ed 2d 209 (1978); *Local 926 International Union of Operating Engineers* v *Jones*, 460 US

669, 103 S Ct 1453, 75 L Ed 2d 368 (1983); *Belknap* v *Hale*, 463 US 491, 103 S Ct 3172, 77 L Ed 2d 798 (1983). The *Garmon* rule was most recently reaffirmed in *Lingle* v *Norge Division of Magic Chef, Inc*, ___ US ___, 56 USLW 4512 (decided June 6, 1988). While the Court in *Lingle* arguably narrowed federal preemption under § 301 of the Labor Management Relations Act, 29 USCA § 185, it made special effort, at note 8, to acknowledge the continuing vitality of *Garmon:*

> Although section 301 preempts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement, and although section 301 preemption is all that is at issue in this case, it is important to remember that other federal labor law principles may preempt state law. Thus, in *San Diego Building Trades Council* v *Garmon*, 359 US 236, 244 (1959), we held that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act [NLRA], or constitute an unfair labor practice under section 8 due regard for the federal enactment requires that state jurisdiction must yield." We added that "courts are not primary tribunals to adjudicate . . . issues" such as "whether the particular activity regulated by the States [is] governed by section 7 or section 8 or [is], perhaps, outside both these sections." Ibid. Rather, "[i]t is essential to the administration of the [NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *Id*, at 244-45.

B. Respondents' Claims Are Based On Alleged Conduct Which The State Court Conceded Would Be Unfair Labor Practices Under Section 8 Of The Act.

The preemption doctrine in *Garmon* requires that respondents' claim in this action be dismissed because those claims are within the exclusive jurisdiction of the NLRB.

Respondents alleged in state court that (1) they were employees of petitioner; (2) each had an oral employment contract with US&W; (3) the contract provided that each would not be displaced by other persons if they worked during the union violence; and (4) petitioner breached the contracts by hiring former Roblin employees and firing them under the new UAW agreement. Therefore the conduct for which respondents seek relief is petitioners' discharge of them in favor of the union members who formerly worked for Roblin and Michner.

That challenged conduct is within the exclusive jurisdiction of the NLRB. Specifically, it is covered by the unfair labor practice provisions of Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the Act, 29 USCA §§ 158(a)(1), (a)(2) and (a)(3); 29 USCA §§ 158(b)(1)(A) and (b)(2). Under these provisions several basic rules apply here:

1. An employer who discriminates against its nonunion employees (such as respondents) in preference to union members (such as the former Roblin and Michner workers) violates Sections 8(a)(1) and (3) of the Act. See, *e.g.*, *Narragansett Restaurant Corp.*, 243 NLRB 125 (1979); *Rockaway News Supply Co.*, 94 NLRB 1056 (1951). A union which causes an employer to discriminate against nonunion employees in favor of the union's members violates Sections 8(b)(1)(A) and (3)

of the Act. *Narragansett Restaurant, supra; Rockaway News, supra.*

2. An employer may not force its employees to deal through a union not selected by its employees. An employer may not recognize, bargain with, or enter into a collective bargaining agreement with, a labor organization which does not represent a majority of its employees. An employer who so recognizes a union, violates Sections 8(a)(1) and (2) of the Act. A labor organization which accepts exclusive bargaining authority without having the support of a majority of the employer's employees violates Section 8(b)(1)(A) of the Act. *Garment Workers' Union* v *NLRB*, 366 US 731, 81 S Ct 1603, 6 L Ed 2d 762 (1961).

Applying these principles, the NLRB has asserted its jurisdiction to remedy unfair labor practices under facts very similar to those at issue here. In *Laborers Local 1140*, 287 NLRB 57 (1987), a cement contractor, Dan Paulsen Construction Co., had a collective bargaining agreement with the Laborers Union requiring Paulsen to hire all employees out of the union's hiring hall and to pay union scale. Due to financial difficulties, Paulsen closed the business in 1983. In 1985, Paulsen decided to return to cement contracting by forming a new company, Cadet Construction Company. On November 13, 1986, Cadet began work on a construction project using a laborer, Jay Underwood, who had not been hired through the union's hiring hall. The following day the union became aware of this fact and demanded that Cadet discharge Underwood or the union would picket the project and shut it down. Cadet complied with the union's demand and Underwood filed an unfair labor practice charge. The Board found that Cadet was not the alter ego of Paulsen Construction and, therefore, was not bound by the exclusive

hiring hall provision in the collective bargaining agreement. Accordingly, the Board held that the union committed an unfair labor practice in causing the discharge of Underwood:

> It is well settled that, absent an exclusive hiring hall agreement, or other legitimate reasons, a union's interference with an employer, causing it to terminate an employee in violation of 8(a)(3) constitutes a violation of Section 8(b)(1)(A) and (2) of the Act. [*Combustion Engineering*, 231 NLRB 1287, 1289 (1977).] We find that Respondent unlawfully caused Cadet to terminate Underwood because he had not been referred by Respondent.

Similarly, in *District 30, United Mine Workers of America*, 278 NLRB 309 (1986), the Board found that the union committed an unfair labor practice by executing a collective bargaining agreement with the employer without the support of a majority of the employer's employees. In that case, the employer, Samoyed Energy Company, Inc., reactivated coal mining operations that formerly had been performed by a company whose employees were represented by the United Mine Workers Union. Although none of the employees hired by Samoyed were members of a union, the Mine Workers demanded that the company sign a labor contract. When Samoyed refused, union pickets shut down the job site. Ultimately, Samoyed succumbed to the union's pressure, and executed a collective bargaining agreement with the Mine Workers requiring, as a condition of continuing employment, that Samoyed's employees join the Mine Workers union. The Board held that since Samoyed was not a successor employer, the union violated Section 8(b)(1)(A) of the Act by entering into a contractual relationship with Samoyed at a time

when the union represented none of Samoyed's employees. *Id* at 316. In addition, the Board held that the union violated Section 8(b)(2) by executing a collective bargaining agreement that required Samoyed's employees to join the union as a condition of employment. *Id.*

The above rules are clearly applicable to the situation existing at US&W in October, 1982. The company signed a collective bargaining agreement with the UAW making the UAW the exclusive representative of its employees. However, at the time the agreement was signed the UAW did not represent those employees. Thus, both the UAW and US&W arguably violated some or all of the above provisions of the Act.

The agreement signed by US&W and the UAW also required US&W to give *union members* (whether former employees of Roblin or not) preference over US&W's existing *nonunion employees*. The agreement, therefore, discriminated against US&W's existing nonunion employees, including respondents. It was arguably in violation of the Act's provisions which prohibit discrimination in employment based on union membership.

Respondents have not asserted that they had no opportunity to obtain relief under the Act's unfair labor practice provisions. Also, respondents have not seriously contested that their discharges by petitioner, pursuant to the UAW agreement, were arguably unfair labor practices. The state trial court, in the opinion affirmed by the Court of Appeals and the Michigan Supreme Court, found as a matter of fact that respondents "held an employment relationship [with US&W] which the NLRA [the Act] would protect." *Findings*, at page 3 [App C at C-2]. The state court also recognized that "*the hiring of the union employees — and thereby displacing plaintiffs — is an unfair labor practice.*" *Findings*, at page 3 [App C at C-3].

C. Because Respondents' Claims Are Arguably Unfair Labor Practices, Garmon Requires That Respondents' Action Be Dismissed.

As shown above, US&W arguably violated Sections 8(a)(1), (2) and (3) of the Act by allegedly improperly discharging its nonunion employees in order to hire union members to replace them. Thus respondents seek a remedy for conduct which is clearly within the exclusive jurisdiction of the NLRB. In this case, the basis of the alleged violation of state law and the basis for a violation of the NLRA are identical — the alleged improper discharge of petitioner's employees and their replacement by the union members.

In addition to the identity of the challenged conduct, the remedies available to petitioner's employees, including respondents, for arguable unfair labor practices were identical to the relief they now improperly seek through state court. Under the Act, an employee who is terminated from employment in violation of the Act is entitled to back pay for wages lost due to the termination, and to reinstatement to employment.[5] Respondents' complaint similarly seeks "reinstatement into their former positions with defendant" and "reimbursement for lost wages and benefits."

Despite the fact that the conduct complained of would have arguably supported an unfair labor practice claim, and despite the fact that the relief requested is identical to what could have been obtained from the Board in an unfair labor practice proceeding, the state

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[5] See NLRA Section 10(c), 29 USCA § 160(c) which gives the Board authority to issue an order requiring a person found guilty of an unfair labor practice "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this subchapter."

courts improperly ruled that *Garmon* did not require preemption of plaintiff's state claims. In doing so, the state courts misapplied *Garmon* itself and misread this Court's case of *Belknap* v *Hale*, 463 US 591, 103 S Ct 3172, 77 L Ed 2d 798 (1983).

1. THE STATE COURTS ERRONEOUSLY DISREGARDED *GARMON* WHEN THEY HELD THAT *BELKNAP* v *HALE* PRECLUDED PREEMPTION.

Although the facts presented to the Supreme Court in *Belknap* v *Hale, supra,* have some apparent similarities to the facts in the present case, there are critical differences.

In *Belknap,* the Teamsters union represented Belknap's employees and had represented them for several years. When negotiations for a new labor contract between Belknap and the union broke down, the union called a strike. As allowed under the Act, Belknap's own employees struck and picketed their employer. New workers were hired by Belknap as "permanent replacements" to take the jobs of the striking employees. An eventual settlement of the strike caused the dismissal of the replacement workers and the reinstatement of the employees who had been on strike. Certain unfair labor practice charges filed by the union during the strike were withdrawn as part of the settlement. The replacement workers then sued Belknap in state court alleging that Belknap breached a state contract promise of permanent employment.

This Court ruled that state law claims were *not* preempted because *the conduct complained of by the replacements would not have given rise to a cause of action and a remedy for the replacements under the Act.* On those facts, the NLRB would have been concerned only with the rights of the striking Belknap

employees because only they had *employment* and bargaining rights with the employer *protected by the Act*. The *replacements had no such rights* and therefore the Act *could not* have provided them with a remedy:

> Belknap contends that the misrepresentation suit is preempted because it related to the offers and contracts for permanent employment, conduct that was part and parcel of an arguable unfair labor practice. It is true that whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the board. *The focus of these determinations, however, would be on whether the rights of strikers were being infringed.* Neither controversy would have anything in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. *The Board would be concerned with the impact on strikers, not with whether the employer deceived replacements* . . . . It is no less true here than it was in *Linn* v *Plant Guard Workers* [383 US 53, 86 S Ct 657, 15 L Ed 2d 582 (1966)] that "[t]he injury" remedied by state law "has no relevance to the board's function" and that "[t]*he board can award no damages, impose no penalty, or give any other relief" to the plaintiffs in this case.*
>
> (emphasis supplied)

The *critical difference* between *Belknap* and the present case is that here, unlike the replacement workers in *Belknap*, the US&W employees who lost their jobs to make room for union members *did have employment rights protected by the Act* and thus *had a cause of action under it*. The state courts totally

failed to recognize this difference. Instead, the Michigan Court of Appeals stated that it did not see *any* difference between the *strike replacements* in *Belknap* and the former *employees* here. The difference, which the Michigan courts failed to appreciate, is that the respondents were new *employees* of a new company and as such had an employment relationship protected by the Act. In *Belknap* the plaintiffs were *strike replacements* who had no such employment relationship.

Simply stated, the Act protects established *employment relationships*, be they union or nonunion. In *Belknap*, the union members were *Belknap's own employees* and as such were protected by the Act. In this case the situation is completely the opposite. The petitioner's *own nonunion employees* had the employment relationship which was protected by the Act. The union members formerly employed by Roblin and Michner had no employment relationship whatever with US&W. The respondents were not replacements for strikers. They had been employed by US&W from the time US&W started its operations. The union members were not strikers. They had never been employed by US&W, and their union, the UAW, was not the representative of US&W's employees.

When US&W signed the agreement with the UAW displacing respondents, respondents could have filed arguably meritorious unfair labor practice charges against US&W for displacing them, and against the UAW for pressuring US&W to do so. Unlike the plaintiffs in *Belknap*, and contrary to the opinions below of the Michigan courts, *the respondents had an available remedy under the Act.*

The proper scope of *Belknap* is shown in the recent case of *Eitmann* v *New Orleans Public Service*, 730 F2d 359, 364 (5th Cir 1984), cert. denied 469 US 1018, 105 S

Ct 433, 83 L Ed 2d 359 (1984). In *Eitmann* the Court found an employee's state court claim for breach of an employment contract was preempted. In finding the state claim preempted, the Fifth Circuit specifically addressed the *Belknap* decision, emphasizing the fact that the Belknap employees were allowed to pursue a state remedy *only because no remedy was available under the NLRA:*

> *Belknap* is consistent with other Supreme Court cases addressing claims only tangentially related to federal labor law. . . .
>
> The *Belknap* holding was premised on the notion that permitting the state action to proceed would not "frustrate any policy of the federal labor laws." 103 S Ct at 3184. The *Belknap* plaintiffs, for example, did not seek a remedy that, had it been awarded by a state court, would have encroached on the function or authority of the National Labor Relations Board, *because the Board could not have granted any relief to the plaintiffs.* . . .
>
> [T]*he Belknap plaintiffs sought relief that the LMRA did not afford them.* See 103 S Ct at 3183. We think that *J. I. Case* [321 US 332, 64 S Ct 576, 88 L Ed 2 726 (1944)] would have mandated a different result had this circumstance been different in *Belknap.*
>
> (730 F2d at 364, emphasis added)

The Michigan courts therefore erred in failing to properly read *Belknap* and properly follow *Garmon* and *Eitmann. Belknap* did not make an exception to the *Garmon* doctrine whenever a breach of an employment contract is alleged. Instead, *Belknap* merely held that an action for breach of an employment contract was not

preempted where the respondents had no available remedy before the NLRB. As the state trial court itself recognized, that was not the case here.

Finally, allowing the state law contract claim involved here, where a remedy is arguably available through the NLRB, would risk frustration of the agency's remedial process in another important way. Under the Act, unfair labor practice charges must be filed within six months of their occurrence. This is to serve the important federal purpose of promoting the swift resolution of those labor disputes within the NLRB's jurisdiction. If a parallel state law contract action is also allowed, such a claim could be filed, in Michigan, up to six *years* after an alleged breach. Therefore, as here, discharged employees would not have to file NLRB claims challenging discharges within the Act's six month period. They could instead wait up to six years to bring claims the Act was intended to promptly resolve. Disputes between employer and employees, intended to be quickly resolved by the NLRB, could be prolonged for years.

2. STATE LAW CONTRACT ACTIONS FOR BREACH OF ALLEGED ORAL CONTRACTS OF EMPLOYMENT ARE NOT MATTERS OF "COMPELLING STATE INTEREST" AND AN EXCEPTION TO *GARMON*.

Under *Garmon*, this Court has recognized an exception to preemption either (1) "where the activity regulated was a merely peripheral concern" of the Act, *and* (2) where the "regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 79 S Ct at 779. This exception to *Garmon* is only applicable where "[t]he interests of the Board and the NLRA, on the one hand, and

the interest of the state in providing a remedy to its citizens for breach of contract, are 'discrete' concerns." *Belknap*, 103 S Ct at 3184.

There is nothing in this Court's cases indicating that the unfair labor practice claims plaintiffs could have raised here are only "peripheral concerns" of the Act. There is also no case indicating that common law contract claims are so uniquely "rooted in local feeling" that regulation by the states should be allowed. This Court's holdings recognizing the exception to *Garmon* have dealt with state issues of libel (*Linn* v *Plant Guard Workers*, 383 US 53, 86 S Ct 657, 15 L Ed 2d 582 (1966)), intentional infliction of emotional distress (*Farmer* v *Carpenters*, 430 US 290, 97 S Ct 1056, 51 L Ed 2d 338 (1977)) and trespass to property (*Sears, Roebuck & Co.* v *Carpenters*, 436 US 180, 98 S Ct 1745, 56 L Ed 2d 209 (1978)). These areas of state concern are obviously of a different character than normal common law contract claims. If such state claims are excepted from *Garmon*, virtually no state law issues would be subject to preemption. This is not what *Garmon* intends.

CONCLUSION AND REQUEST FOR RELIEF

The *Garmon* doctrine of preemption is squarely applicable to this case. The conduct challenged is the very same conduct which was arguably an unfair labor practice. *Garmon* requires preemption in such a situation. "Even the state's salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Garmon*, 79 S Ct at 780.

Belknap does not apply here. That case is not applicable where state law is merely used as an alternative to a potentially available NLRB remedy for the same conduct. *Belknap* did not involve facts, as the present case does, where the state court plaintiffs could have obtained relief from the NLRB for the conduct involved in their state court lawsuits. In *Eitmann* the Fifth Circuit properly held that the state claims in *Belknap* would have been preempted if the NLRB could have granted relief.

The Michigan courts' decisions here improperly disregarded *Garmon* by holding that a state law claim can be brought *even where* the identical conduct complained of in the state law claim is the basis for an unfair labor practice charge and relief. There is absolutely no support in this Court's cases for such a proposition. State courts must be relied on to apply the *Garmon* doctrine properly, not to rewrite it as was done in this case. Because the Michigan courts did so, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: June 24, 1988

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered March 29, 1988)

(CARL STALLWORTH, COYLE SMITH, and YVONNE HILL, Personal Representatives for the Estate of VINCENT GARRETT, Plaintiffs-Appellees, v UNITED STEEL & WIRE COMPANY, Defendant-Appellant – SC: 81532; COA: 89533; CC: 83-730-CZ; RHONDA HOWLETT and KATHERYN WHITNEY, Plaintiffs-Appellees, v UNITED STEEL & WIRE COMPANY, Defendant-Appellant – SC: 81533; COA: 89534; CC: 83-730-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should now be reviewed by this Court.

(*Certification Omitted*)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Released August 6, 1987)

(CARL STALLWORTH, COYLE SMITH, and YVONNE HILL, Personal Representatives for the Estate of VINCENT GARRETT, Plaintiffs-Appellees, v UNITED STEEL & WIRE COMPANY, Defendant-Appellant — No: 89533; RHONDA HOWLETT and KATHERYN WHITNEY, Plaintiffs-Appellees, v UNITED STEEL & WIRE COMPANY, Defendant-Appellant — 89534)

Before: J. B. Sullivan, P.J.,
G. R. McDonald and J. M. Graves*, JJ.

PER CURIAM

Defendant United Steel & Wire Company of Battle Creek, Michigan, appeals by leave granted from a Calhoun County Circuit Court order denying defendant's motion for summary disposition.

Prior to May 17, 1982, Roblin Industries manufactured shopping carts and other food handling equipment in three plants in Battle Creek, Michigan. Roblin had two collective bargaining agreements with the UAW for its Battle Creek hourly employees, one with UAW Local 704 covering Roblin's Battle Creek production and maintenance employees and the other with UAW Local 1215 covering Roblin's Battle Creek office clerical employees. At the same time, another firm, Michner Plating Company, operated a plating business in space rented from Roblin. Michner was a captive

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* Circuit judge, sitting on the Court of Appeals by assignment.

plater, that is it did plating work almost exclusively for Roblin. Michner also had a collective bargaining agreement. The agreement was with the Teamsters Union and covered its Battle Creek hourly production and maintenance employees.

United Steel and Wire Company was incorporated as a new corporation on May 17, 1982. On July 2, 1982, Roblin and Michner went out of business and terminated all of their Battle Creek employees. United Steel acquired the assets of the two operations and began operating on July 23, 1982, by hiring new employees. United Steel determined that, as a new corporation, it was not required to honor the collective bargaining agreements of its predecessor corporation. Accordingly, it undertook to hire new employees. Although United Steel did offer employment to the former union employees of Roblin and Michner, very few of those employees accepted the employment as United Steel would not continue the terms and conditions of employment contained in the prior collective bargaining agreements. United Steel gave its new employees an employee manual which indicated that their employment was terminable by the employer at will.

Shortly after United Steel went into business the UAW and Teamsters began picketing the company's three Battle Creek plants. The picketing became violent and the employer obtained an injunction against violence. The UAW filed a lawsuit in Federal District Court for the Western District of Michigan, contending that United Steel was obligated to honor the collective bargaining agreement between the Union and Roblin because United Steel was Roblin's "alter ego." The City of Battle Creek intervened in this strike by appointing a blue ribbon committee to attempt to resolve the labor

dispute. Partly because of that pressure and partly because its economic development financing through the City was jeopardized, United Steel negotiated a collective bargaining agreement with the UAW under which it agreed to hire former Roblin and Michner employees and to give them preference for available jobs over United Steel's existing work force, which included the plaintiffs. The collective bargaining agreement was ratified by the former employees on October 2, 1983. The agreement became effective the next day. Immediately after it was ratified, United Steel hired the former Roblin and Michner employees, displacing United Steel's existing work force, including the instant plaintiffs.

Plaintiffs did not file an unfair labor practice charge with the National Labor Relations Board. Instead, the twenty plaintiffs, workers displaced by former Roblin and Michner employees, commenced this action in circuit court for breach of contract. Plaintiffs alleged that United Steel hired them with assurances that they would be permanent employees, not susceptible to replacement by striking union employees, and that plaintiffs' detrimental reliance on those promises constituted a contract of employment between the plaintiffs and the company. Plaintiffs allege that their replacement by the striking employees constituted an abuse of that contract of employment.

United Steel answered with a motion for summary disposition under MCR 2.116(C)(4), contending that state court jurisdiction over the action was preempted under the National Labor Relations Act, 29 USC Sec 157 *et seq*, because plaintiffs' grievances were exclusively within the jurisdiction of the National Labor Relations Board. The trial court denied the motion and defendant United Steel appeals to this Court by leave granted.

Defendant argues that plaintiffs' State court cause of action was preempted by the National Labor Relations Act, 29 USC 157 *et seq* because the same conduct complained of in the state court complaint would have given rise to an unfair labor practice triable before the National Labor Relations Court which could have awarded relief identical to that sought in the state court.

Plaintiffs claim that the United States Supreme Court in *Belknap Inc* v *Hale*, 463 US 491; 103 S Ct 3172; 77 L Ed 2d 798 (1983), expressly held that a nonunion worker's state law breach of contract claim was not preempted by federal labor legislation. Hence, plaintiffs' state law breach of employment contract claims were not preempted by the National Labor Relations Act and the trial court properly denied defendant's motion for summary disposition pursuant to MCR 2. 116(C)(4).

The guidelines for federal preemption in labor controversies are clear, but their application to the facts of a given case can be difficult. The preemption doctrine derives from *San Diego Building Trades Council* v *Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959) and *International Association of Machinists* v *Wisconsin Employment Relations Comm*, 427 US 132; 97 S Ct 2548; 49 L Ed 2d 396 (1976). The *Garmon* doctrine provides:

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon, supra*, 783.

The *Machinists* doctrine proscribes state regulation and causes of action concerning conduct that Congress

intended to be unregulated and left to the free play of economic forces.

The facts in *Belknap Inc* v *Hale*, 463 US 491; 103 S Ct 3172; 77 L Ed 2d 798 (1983) are very similar to those of the present controversy. In *Belknap*, the company hired replacement workers under a promise of permanent employment when its regular employees went on strike. However, when the company settled the strike with the union by promising to rehire the striking employees, Belknap laid off the replacement workers. The replacement workers then brought suit against Belknap in state court for breach of contract. The Kentucky trial court dismissed the action under the doctrine of preemption, but the Kentucky Court of Appeals reversed. The Court of Appeals' reversal was affirmed by the Kentucky Supreme Court and eventually by the United States Supreme Court. The Supreme Court held that the state's interest in protecting its workers from breaches of contracts of employment was not superseded by the federal labor legislation under the *Garmon* and *Machinists* doctrines, stating:

> "We have already concluded that the federal law does not expressly or impliedly privilege an employer, as part of a settlement with a union, to discharge replacements in breach of its promises of permanent employment. Also, even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers. The interest of the Board and the NLRA, on the one hand, and the interest of the

> state in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns, cf. *Farmers* v *Carpenters, supra,* 430 U.S., at 304, 97 S.Ct., at 1065."

We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or could frustrate any policy of the federal labor laws. *Belknap, supra,* 77 L Ed 2d at 815-816.

Defendant attempts to distinguish *Belknap* on the ground that the replacement workers in that case, hired while Belknap had collective bargaining obligations with the strikers and their union, had no protection under federal labor legislation and, therefore, had to be accorded the protection of a state action for breach of contract. By contrast, defendant contends in the present case, that it had no obligation to the UAW and Teamsters Union or the Roblin and Michner employees. However, defendant argues that it incurred an obligation of fair practices when it hired replacement workers. Thus, because the NLRA protects relationships, not employees, defendant's obligation of fair practice is protected under federal labor legislation. Therefore, because plaintiffs were United Steel and Wire Company employees, employees to which the company owed an obligation to refrain from unfair labor practices, it is fully protected under federal legislation and their remedy is an unfair labor practice proceeding before the NLRB. Thus these plaintiffs have an adequate federal remedy unlike the plaintiffs in the [*sic*] *Belknap.*

The distinction drawn by the defendant is not persuasive. Defendant's distinction fails to adequately explain why the replacement employees herein have a federal remedy while the replacement employees in *Belknap* did not. Moreover the question whether defendant had

collective bargaining obligations with the instant strikers was never determined by the court or NLRB. The parties, in settling their dispute, agreed that the settlement ". . . shall not in any way constitute an admission with respect to these lawsuits, or any other litigation that may be pending about the events in question." . . . .

Finally defendant argues that the UAW was a minority union and that their collective bargaining agreement with the union discriminated against non-union employees contrary to section 8 of the NLRA. Consequently, the company concludes, plaintiffs have an unfair labor practice remedy against it. The argument is not persuasive. As in *Belknap* an unfair labor practice proceeding would have been concerned with the rights of the former union employees, and not to the replacement employees. As the *Belknap* court stated,

> "The focus of these [NLRB] determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether *Belknap* made misrepresentations to replacements that were actionable under state law." 77 L Ed 2d at 814.

The trial court is affirmed.

/s/ Joseph B. Sullivan
/s/ Gary R. McDonald
/s/ James M. Graves, Jr.

APPENDIX C

FINDING

(State of Michigan – Circuit Court – County of Calhoun)

(Released October 3, 1985)

(CARL STALLWORTH, COYLE SWIFT, VINCENT GARRETT, et al, Plaintiffs, vs UNITED STEEL & WIRE, Defendant — Docket No. 84-611 CZ; and RHONDA HOWLETT and KATHERYN WHITNEY, Plaintiffs, vs UNITED STEEL & WIRE, Defendant — Docket No. 85-26 CZ)

This case is before the Court on Defendant's motion for summary disposition on the grounds that this Court lacks the jurisdiction in that this action is preempted by the National Labor Relations Act, 29 USC Sec 157, et seq.

In this cause of action the Plaintiffs claim that they were hired by Defendant when Defendant's regular employees were on strike; that, at the time of hiring and during the interview process, Plaintiffs were assured by Defendant that, if they successfully completed a probationary period, they would have permanent jobs with Defendant and that they would not be replaced by Defendant's employees who were on strike at that time; that several of the Plaintiffs successfully completed their probationary periods and worked in reliance on the assurances given them by Defendant before being laid off, at which time Defendant rehired the striking employees; that such assurances and Plaintiffs' reliance on those assurances while working for Defendant constituted employment contracts; and that such layoffs of Plaintiffs, when Defendant rehired its

striking employees, constituted a breach of those contracts with Plaintiffs.

In his brief Defense Counsel has cited many authorities in support of Defendant's position to show that this Court lacks jurisdiction. Defendant claims that an employer who discriminates against a non-union employee in preference to a union employee violates Section 8(a)(1) and (3) of the NLRA, citing *Narragansett Restaurant Corp.*, 243 NLRB 125 (1979), and *Rockaway News Supply Co.*, 94 NLRB 1056 (1951). Defendant further claims that a union which causes an employer to discriminate against a non-union employee in favor of a union employee violates Section 8(b)(1)(A) and (2) of the NLRA. Defendant claims that these rules are clearly applicable to the situation confronted by Defendant in October 1982 when Defendant signed the collective bargaining agreement with the UAW. That agreement required the Defendant to hire the striking UAW employees who were employed by Roblin Industries and to give them preference over Defendant's existing employees.

Defendant also claims that the critical difference here and the facts of the case of *Belknap* v *Hale*, 103 SCt 3172; 77 L Ed 2d 798 (1983), cited by Plaintiffs, is that the US&W employees who lost their jobs to make room for union members did have a cause of action under the NLRA. Defendant claims that the Act protects employment relationships, be they union or non-union. Defendant claims that, in *Belknap*, the union members held an employee's relationship with the employer, which the NLRA would protect; that they had been employed by Belknap for an extended period prior to the strike.

However, in the instant case, the non-union employees held an employment relationship which the

NLRA would protect. They had also been employed by US&W since the inception of the company in that the Defendant was incorporated on May 17, 1982 and did not begin operating until July 23, 1982 when it acquired certain assets of Roblin Industries and Michner Plating Company. When Defendant US&W started its operations on July 26, 1982 and hired a work force, it did not have the bargaining units of its newly-acquired companies. And, on August 7, 1982 the UAW and the Teamsters unions picketed Defendant and subsequently forced it to accept the employees of those companies and the bargaining units through an agreement reached by the parties.

The Plaintiffs claim that the *Belknap* court found that the interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other hand, are discrete concerns and that it seems likely that, even had the Supreme Court believed the *Belknap* plaintiffs had an arguable unfair labor practice claim, the court would not have applied the preemption doctrine because of the State's discrete interest in providing a remedy for a breach of contract.

In reviewing the allegations of the Plaintiffs' complaints, the Plaintiffs allege a breach of contract. Defendant, at the time of hiring Plaintiffs, knew or was aware of the existing problems of the employees of its acquired interests in Roblin and Michner. While it may appear that the hiring of the union employees — and thereby displacing Plaintiffs — is an unfair labor practice, this Court's interpretation of the holding in the *Belknap* case does not preclude an action for breach of contract in a state court.

The *Belknap* court said:

> *Under Garmon, a state may regulate conduct that is of only peripheral concern to the act or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of the law.*

It appears in this case, as in *Belknap*, that the claimed breach is the discharge of Plaintiffs to make way for strikers of Defendant's acquired companies, an action allegedly contrary to promises that are binding under state law. This Court does not interpret the *Belknap* decision strictly to apply to situations as Defendant would have this Court believe. Even though the opening of its operations, the promises made by Defendant are similar, this Court is of the opinion that the language and ruling set down in *Belknap* apply to the factual situation that exists in this case.

Therefore, based upon the facts and circumstances in this case and the ruling in *Belknap, supra*, this Court finds that the action here for breach of contract is not preempted by the NLRA and that the Defendant's motion for dismissal for lack of jurisdiction should be and hereby is denied.

An order denying Defendant's motion may be entered in accordance with this finding.

/s/ Paul Nicolich
Circuit Judge

Dated: October 3, 1985

(2)

No. 88-59

In The

Supreme Court of the United States

October Term, 1988

UNITED STEEL & WIRE COMPANY,

Petitioner,

vs.

CARL STALLWORTH, COYLE SWIFT, VINCENT GARRETT, R. D. WARREN, WALTER STOKES, HELEN ANDERSON, DAVID CHASE, LARRY CLINTON, MILTON FIELDS, RHONDA HOWLETT, CARL JOHNSON, DAWN KING, CARL MAYBERRY, HOWARD MORGAN, THOMAS ROBINSON, WILLIE SLAUGHTER, CLARENCE TRAVIS, BRIAN TREAT, KATHY WHITNEY and RODGER WILLIAMS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

When the Battle Creek United Steel & Wire operation, as it was then known, was closed by its owner, Roblin, in early July 1982 and all of its union employees' jobs were terminated, the United Auto Workers Unions ("UAW") began to protest the loss of jobs for its members and made it clear that the "rehiring" procedure used by the Petitioner, United Steel & Wire ("US&W") would be challenged by the union.

The Roblin operations of United Steel & Wire were ceased on July 1, 1982. On July 9, 1982 the UAW filed a

law suit against Roblin and the Petitioner claiming they had an obligation to hire only UAW members who were formerly employed by Roblin and to abide by the collective bargaining agreement with the UAW. The UAW argued that US&W was the *alter ego* of Roblin. The UAW initiated picketing in front of the Battle Creek plants of the Petitioner approximately five (5) days after the Petitioner started operating with nonunion employees.

All of the Respondents in this action were hired by the Petitioner on July 28, 1982 or shortly thereafter. Most of the Respondents were hired through the Michigan Employment Security Commission office and all were informed by the Petitioner that a new company was forming and they would have permanent jobs if they completed the requisite probationary period. They were told several times throughout their employment with the Petitioner that they would not be replaced by the union employees who were picketing at the time.

All of the Respondents were forced to withstand serious physical attacks and threats of attack from the picketing employees while entering and leaving the work place during the course of their employment. The Respondents relied on the Petitioner's assurances that it would not replace them and withstood the attacks from the picketers.

The dispute between the Petitioner and the UAW was never litigated and no court action resolved it. Instead, a settlement agreement was reached between the Petitioner and the UAW on October 2, 1982 including a collective bargaining agreement between the two parties and an agreement to displace Respondents and re-employ union members.

When the settlement was reached between Petitioner and the striking union employees, Respondents were all

gradually placed on layoff and replaced by the union members. It is the contention of the Respondents that the assurances provided to them upon hire by Petitioner, coupled with Respondents' detrimental reliance on those promises, constituted a contract of employment between the Respondents and Petitioner. Respondents further contend that the replacement of Respondents by the striking employees was a breach of their contract of employment with Petitioner and thus actionable in state court under Michigan contract law.

Petitioner claims Respondents' State Contract Claim is preempted by Federal law. The trial court denied Petitioner's Motion for Summary Disposition and the Michigan Court of Appeals affirmed the trial court's decision. The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal and this matter is now before the U.S. Supreme Court on Petitioner's Petition for Writ of Certiorari.

ARGUMENT

I.

RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Petitioner correctly states in its brief that the doctrine of preemption is generally derived from two Supreme Court cases: *San Diego Building Trades Council* v *Garmon*, 359 US 236 (1959) and *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132 (1976). To summarize those cases, the *Garmon* doctrine preempts state actions which regulate activity protected or prohibited by the National Labor Relations Act (NLRA). The *Machinists* doctrine preempts state

actions which regulate activity that Congress intended to be left unregulated and controlled by the free play of economic forces. In *Belknap, Inc.* v *Hale*, 463 US 591, 77 L Ed 2d 798 (1983), the Supreme Court held that a case nearly identical to the present case would not be precluded by the federal preemption doctrine and discussed both the *Machinists* and *Garmon* cases. Petitioner herein argues that the *Garmon* doctrine would preempt Respondents' state cause of action. Central to this matter and to the *Belknap* decision, is another line of preemption cases which recognize an exception to *Garmon*. In those cases, matters in which states have a distinct interest are excepted from the preemption doctrine. This matter falls under that line of cases.

A. Respondents Did Not Have An Arguable Unfair Labor Practice Claim.

Petitioner claims that because US&W was a new company it had no duty to negotiate with the union employees and thus violated the NLRA when it replaced Respondents with union members. Thus, Petitioner argues, Respondents had the basis for an unfair labor practice claim with the National Labor Relations Board (NLRB) and their state court claims should be preempted.

Respondents would only have an arguable unfair labor practice claim, if the UAW had no valid claim to the former positions of its members. That issue was never resolved by a court or the NLRB and the matter was settled. The UAW did not voluntarily dismiss its claim against US&W, but dismissed it only after US&W agreed to return the union employees to their former positions. The "Accord and Satisfaction" signed by the Petitioner, US&W and the UAW stated in part:

> The UAW and its Locals 704 and 1215, in consideration of certain promises made by the

United Steel & Wire Co. in a collective bargaining agreement, agreed to by the said parties, hereby agree:

(1) To dismiss voluntarily Count I of *UAW et al.*, Case No. K82-205-CA(9), currently pending in the U.S. District Court for the Western District of Michigan. If accomplished before ratification, the said dismissal shall be without prejudice, until the said collective bargaining agreement is ratified. Immediately upon ratification, it shall be with prejudice. It shall be without attorney fees or costs against either party.

* * *

The parties further agree that this shall not, in any way, constitute an admission with respect to these lawsuits, or any other litigation that may be pending about the events in question. Rather, the parties have entered into this accord and satisfaction to resolve all issues arising between them, their agents, officers and/or members, as to the allegations made in the said litigation, or otherwise arising in connection with their labor dispute, in the earnest desire to avoid the cost and risk of further litigation.

Thus, the UAW did not voluntarily dismiss its claim against US&W, but dismissed it only after US&W agreed to return the union employees to their former positions.

Petitioner's attempt to distinguish the facts of the present case and *Belknap* is weakened by the fact that the union in this case had filed a law suit claiming a duty on Petitioner's part to negotiate with the union. This matter was never resolved by a court because of the settlement reached by the parties. If the union had

been correct, the facts of *Belknap* and the present case would be indistinguishable and Respondents would not have had an available NLRB remedy. Respondents in both cases were nonunion employees replaced by union employees with whom the company had the duty to negotiate. The *Belknap* Court explained:

> . . . The claimed breach is the discharge of respondents to make way for strikers, an action allegedly contrary to promises that were binding under state law. As we have said, respondents do not deny that had the strike been adjudicated an unfair labor practice strike Belknap would have been required to reinstate the strikers, an obligation that the state court could not negate. But respondents do assert that such an adjudication has not been made, *that Belknap prevented such an adjudication by settling with the Union and voluntarily agreeing to reinstate strikers*, and that, in any event, the reinstatement of strikers, even if ordered by the Board, would only prevent the specific performance of Belknap's promises to respondents, not immunize Belknap from responding in damages from its breach of its otherwise enforceable contracts.
>
> *Belknap*, 77 L Ed 2d at 815, emphasis supplied.

In this case and in *Belknap*, the validity of the position of the striking employees and the legal status of the replacement employees were in question and were not resolved by a court or board finding. Instead the employer voluntarily settled the matter with the striking employees and replaced the nonunion employees. The Court recognized in *Belknap* that even had the NLRB ordered reinstatement of the strikers, the replacement employees would still have a state cause of action for breach of contract. The Court recognized that

an employer sets itself up for liability to both the strikers and the replacement employees by making promises of permanent employment to the replacements. See footnote 9, *Belknap*, 77 L Ed 2d at 811.

Again, it is clear that the only difference between the *Belknap* plaintiffs and the Respondents herein are the facts which led to the labor dispute in question. Once the labor dispute had begun, the facts of both cases are essentially identical. To find that Respondents had an arguable unfair labor practice claim, this Court must assume that a final resolution of the labor dispute in this case by a court would have resulted in a finding for the employer. Such a resolution never occurred and the employer chose instead to settle the matter. In fact, if the Court had held for the employer, the Respondents would still be employed. If the union had won, the Respondents would have had no unfair labor practice claim. The present facts could result only from a settlement. Just as in *Belknap*, this Court must view the present Respondents as innocent third parties to a settled labor dispute, without making a finding as to what the final outcome would have been if the labor dispute had been fully litigated. Thus, the factual distinction attempted by the Petitioner is false and the present facts very clearly mirror the dispute in *Belknap*.

B. This Case Falls Under The Exception To The *Garmon* Doctrine Relied On By The Court In *Belknap, Inc.* v *Hale.*

Petitioner argues that if this Court accepts that Respondents had an arguable unfair labor practice claim, then the *Garmon* doctrine requires preemption of their state claims. While the *Belknap* Court discussed the question of whether or not the replaced employees had a claim which the NLRB could resolve,

the Supreme Court did not base the *Belknap* opinion on that issue. The Court instead based its opinion on whether or not the state causes of action brought by the *Belknap* plaintiffs were "so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law." *Belknap*, 77 L Ed 2d at 814.

The *Belknap* Court first analyzed the *Belknap* plaintiffs' state claim for misrepresentation. The Court discussed the line of cases finding exceptions to the *Garmon* doctrine, including *Linn* v *Plant Guard Workers*, 383 US 53 (1966); *Farmer* v *Carpenters*, 430 US 290 (1977); and *Sears Roebuck & Co.* v *Carpenters*, 436 US 180 (1978). Petitioner, in its brief at page 24 cites this line of cases as illustrating its argument that the plaintiffs in those cases had no NLRB remedy available as opposed to its claim that Respondents herein had such a remedy. It is clear, however, that the Supreme Court took this precedent into account when it finally concluded that:

> The state interests involved in this case [state claim for misrepresentation] clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.
>
> *Belknap*, 77 L Ed 2d at 815.

Thus, the Court based its opinion on the State's special interests, not whether the plaintiffs had an available NLRB remedy.

Finally, after a discussion of the misrepresentation issue and a finding that the misrepresentation claims were not preempted, the Court went on to discuss the *Belknap* plaintiffs' claim for breach of contract. The Court stated:

> Neither can we accept the assertion that the breach of contract claim is preempted. . . .
>
> * * *
>
> . . . We have already concluded that the federal law does not expressly or impliedly privilege an employer, as part of a settlement with a union, to discharge replacements in breach of its promises of permanent employment. Also, even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers. *The interests of the Board and the NLRA, on the one hand, and the interest of the state in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns,* c.f. *Farmer* v *Carpenters, supra,* at 304, 51 L Ed 2d 338, 97 S Ct 1056. We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.
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> *Belknap,* 77 L Ed 2d at 815-816, emphasis supplied.

The "discrete" concerns are identical in this case.

Petitioner cites other cases in which the Supreme Court did not apply the exception to *Garmon* for matters involving state interests. For instance, the 5th Circuit case entitled *Eitmann* v *New Orleans Public Services,* 730 F2d 359 (5th Cir 1984). Yet, neither this case nor others cited by the Petitioner involve facts

which so closely duplicate the facts in the present case as those of the *Belknap* decision. The Court in *Local 926, International Union of Operating Engineers* v *Jones*, 460 US 669 (1983) neatly outlined the theory behind the recognized exceptions to the *Garmon* doctrine:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S. at 245, 79 S. Ct., at 779; see *Sears, supra*, 436 U.S., at 187-90, 98 S. Ct., at 1752-54. Although the '*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion,' *Sears, Roebuck & Co.* v *Carpenters, supra*, at 188, 98 S. Ct., at 1752, if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra*, 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in the local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra*, 359 U.S., at 243-244, 79 S. Ct., at 778. The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

> See *Sears, supra*, 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra*, 430 U.S., at 297, 97 S. Ct., at 1061. *Jones*, 103 S. Ct. 1453, 1458-1459.

Therefore, the Supreme Court has regularly recognized that *Garmon* will not be applied in a mechanical fashion and that the question of whether a state cause of action is to be excepted from the *Garmon* doctrine "involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens."

The *Belknap* Court undertook such a sensitive balancing between the interests of the state in protecting replacement employees and the interests of federal labor law in resolving labor disputes. The Court noted:

> Arguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will 'burden' the employer's right to hire permanent replacements are no more than arguments that 'this is war,' that 'anything goes,' and that promises of permanent employment that under federal law the employer is free to keep, if it so chooses, are essentially meaningless. It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree with the dissent that Congress intended such a lawless regime.
>
> *Belknap*, 77 L Ed 2d at 808.

The Supreme Court in *Belknap* spoke clearly in allowing a state cause of action for breach of contract for nonunion replacement employees.

CONCLUSION

Petitioner herein has attempted to muddy the waters surrounding the *Belknap* decision by citing a distinction between the facts of the *Belknap* case and this case as critical. In fact, the only difference between the facts of the *Belknap* case and this case is the method by which the dispute between the employer and the union began. That distinction has no bearing on the critical finding in the *Belknap* case: innocent third parties to a labor dispute have a right to sue the employer in state court without preclusion of the action by the preemption doctrine. The *Belknap* Court recognized that the interests of the NLRB on one hand and the interests of the state in providing a remedy to its citizens for breach of contract on the other, are discrete concerns. This case, therefore, very neatly fits into the line of cases recognized by the Supreme Court wherein a state cause of action is permitted under an exception to the *Garmon* doctrine.

Finally, the Respondents' claim for relief against the Petitioner is well grounded in Michigan law. See *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW 2d 880 (1980), *rehearing denied* 409 Mich 1101 (1980). In that respect this case is similar to the recent decision of the Supreme Court in *Lingle* v *Norge Division of Magic Chef, Inc.*, __ US __, 56 USLW 4512 (decided June 6, 1988). In *Lingle*, the Supreme Court narrowed the grounds for Federal preemption under Sec. 301 of the Labor Management Relations Act, 29 USCA § 185. We can discern no reasons why the

holding in *Lingle* should not be applied to the claims of the Petitioner in this matter.

WHEREFORE, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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